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No. 86-288

In The
Supreme Court of the United States
October Term, 1986

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

vs.

STEPHEN R. MATTATALL,

Respondent.

SUPPLEMENTAL BRIEF OF THE PETITIONER

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State of Rhode Island

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Now comes the Petitioner, by its attorney, and supplements its original Petition and Reply Brief in accordance with Rule 22.6. Petitioner represents that, since the filing of the foregoing documents, three new decisions have been reported that conflict with the decision of the Rhode Island Supreme Court in the instant case. Because such a conflict is one clear ground for the grant of certiorari pursuant to Rule 17.1(c), these decisions are of sufficient significance that the Court should consider them before acting on the Petition.

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS IN CONFLICT WITH TWO RECENT DECISIONS OF THE SUPREME COURT OF FLORIDA AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

In the instant case, the Rhode Island Supreme Court held that the Sixth Amendment required the suppression of the defendant's statements to a private citizen. The trial judge specifically found that the police had played no role in eliciting the statements and had merely listened to the conversation between the defendant and the citizen. Despite the passive nature of the police conduct in this case, the Rhode Island Supreme Court found that this court's decision in *Maine v. Moulton*, 106 S. Ct. 477 (1985), required suppression.

The instant supplemental memorandum has been filed because of three recent cases that conflict with the decision of the Rhode Island Supreme Court. These cases are in direct conflict with the result reached in the instant case, and they therefore present this Court with the type of split in authorities that justifies review by certiorari.

All of the cases were decided after September 1, 1986, and were therefore unavailable to the parties at the time the petition for certiorari was filed. The cases are discussed infra, and copies of all cases have been appended hereto.

1. *DuFour v. State*, No. 65,694 (Florida Supreme Court) (Sept. 4, 1986) (LEXIS slip opinion appended hereto). In *DuFour*, the defendant alleged that his Sixth Amendment rights had been violated because a cellmate testified against him at trial. The Florida Supreme Court rejected defendant's Sixth Amendment claim, finding that the cellmate-witness in DuFour's case had voluntarily come to the authorities and offered to give evidence against the defendant. Thus, the confrontation and conversation between DuFour and the informant resulted from no activity by the police. Finding no evidence that the police had actively elicited incriminating statements from the defendant, the court in *DuFour* found no Sixth Amendment violation.

This result stands in stark contrast to the decision in the instant case. In the case at bar, the record demonstrated that the police were entirely passive listeners to the conversation between the citizen-witness and the defendant. The decision of the Rhode Island Supreme Court is therefore in direct conflict with the decision of the Florida Supreme Court.

2. *United States v. Hicks*, 798 F.2d 446 (11th Cir. Sept. 3, 1986). In *Hicks*, the Eleventh Circuit rejected the defendant's Sixth Amendment claim. This case involved a cellmate situation similar to the one in *DuFour*, *supra*. The court specifically found that the authorities

had neither deliberately planted an informant in the cell, nor had they instructed the witness to conduct an interrogation. Finding the government's role to have been totally passive, the Eleventh Circuit rejected the defendant's Sixth Amendment claim. This decision, again, stands in sharp contrast to the result reached by the Rhode Island Supreme Court in the instant case.

3. *United States v. Taylor,* No. 85-1758 (10th Cir. Sept. 8, 1986) (LEXIS slip opinion appended). In this case a prison inmate approached authorities and reported that the defendant had made incriminating admissions to him. The informant agreed to be placed in a cell with the defendant. During the informant's stay in the cell, the defendant made incriminating admissions that were subsequently used against him. Although this informant testified that he hoped for some special treatment as a result of his conduct, the Tenth Circuit held that he was merely an informant and not an agent of the government. The court reasoned that even if the informant had deliberately elicited incriminating statements, there would be no bar to the evidence gathered because he was not acting as an agent of the prosecution.

In *Taylor* the police played a far more active role than they did in the instant case. Indeed, the police in the case at bar were entirely passive. Applying the reasoning of *Taylor* to the instant case, it is clear that the Tenth Circuit and the Rhode Island Supreme Court are in stark conflict.

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CONCLUSION

The foregoing recent cases clearly conflict with the decision of the Rhode Island Supreme Court in the case at bar. The existence of a conflict between state and federal courts clearly justifies certiorari in the instant case. R. 17.1(c). For this reason, and for the reasons already set forth in the Petition and the Reply Brief, this Court should grant a writ of certiorari to review the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

STATE OF RHODE ISLAND
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PLANTATIONS

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APPENDIX

DONALD WILLIAM DUFOUR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 65,694

Supreme Court of Florida

Slip Opinion

September 4, 1986

An Appeal from the Circuit Court in and for Orange County, Michael F. Cycmanick, Judge—Case No. CR 82-5467.

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., Concur OVERTON, J., Concurs in result only in the conviction, and concurs with the sentence.

James B. Gibson, Public Defender, Brynn Newton, Assistant Public Defender, for Appellant.

Jim Smith, Attorney General, W. Brian Bayly, Assistant Attorney General, for Appellee.

ADKINS

ADKINS, J.

Donald William Dufour appeals his conviction of first-degree murder and the death sentence imposed. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm both.

The evidence at trial established the following scenario. State witness Stacey Sigler, appellant's former girl-

friend, testified that on the evening of September 4, 1982, the date of the murder, appellant announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, appellant called Sigler and asked her to meet him at his brother's home. Upon her arrival, appellant was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.

Appellant had met the victim in the bar and driven with him to a nearby orange grove. There, appellant robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.

According to witness Robert Taylor, a close associate of appellant's, appellant said that he had shot a homosexual from Tennessee in an orange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from appellant a piece of the stolen jewelry, helped appellant disassemble a .25 automatic pistol and discard the pieces in a junkyard.

State witness Raymond Ryan, another associate of appellant's, also testified that appellant had told him of the killing, and that appellant had said "anybody hears my voice or sees my face has got to die." Noting appellant's possession of the jewelry, Ryan asked him what he had paid for it. Appellant responded "You couldn't afford it. It cost somebody a life." Ryan further testified that he had seen appellant and Taylor dismantle a .25 caliber pistol.

Henry Miller, the final key state's witness, testified as to information acquired from appellant while an inmate in an isolation cell next to appellant's. In return for immunity from several armed robbery charges, Miller testified that appellant had told him of the murder in some detail, and that appellant had attempted to procure through him witness Stacey Sigler's death for $5,000.

At the penalty phase of the trial, Taylor testified over objection to the details of a Mississippi murder for which appellant had been convicted of first-degree murder. The jurors unanimously recommended death and appellant was so sentenced.

Appellant urges that reversal of his conviction is warranted upon a number of grounds. First, he contends that the trial court erred in denying his motion to suppress evidence seized during a search of his residence. The insufficiency of the affidavit supporting the warrant, it is argued, renders the warrant invalid and the fruits of the search inadmissible. An examination of the affidavit, however, leaves little doubt that it amply established the necessary probable cause.

The affidavit, sworn to by an Orange County detective, first indicated that the victim had been murdered with a .25 caliber pistol, and identified certain unique jewelry last seen on the victim's person. The heart of the affidavit centered upon the statement of Raymond Ryan. Ryan stated that appellant informed him that he had killed a person for his gold jewelry, and that he (Ryan) had seen some of this jewelry in the possession of appellant and Robert Taylor. Finally, Ryan indicated that appellant and Taylor "were very close friends and frequent-

ly visit each other's apartment, and have committed other crimes together," and that he had seen in Taylor's possession a .25 caliber automatic.

Appellant initially argues that the weaknesses rendering the affidavits insufficient in Yesnes v. State, 440 So.2d 628 (Fla. 1st DCA 1983), and King v. State, 410 So.2d 586 (Fla. 2d DCA 1982), similarly inflict the instant affidavit. We disagree.

A crucial factor distinguishes the affidavits in Yesnes and King from the instant affidavit. In the first two cases, the affidavits were based on the substantially uncorroborated statements of shadowy and unknown confidential informants. The Yesnes court, for instance, applying the "totality of the circumstances" test set forth in Illinois v. Gates, 462 U.S. 213 (1983), found the affidavit "totally lacking in facts sufficient to show the requisite veracity or reliability of the unnamed informants and the information supplied by them." 440 So. 2d at 632. Here, the disclosure of the source of the information and the specificity of the facts disclosed, combined with the detective's independent investigation tending to corroborate Ryan's statements, manifestly established the probable cause justifying the search.

The weakness present in King is likewise absent in the instant affidavit. In that case, the confidential informant never indicated when he saw the illegal act—the defendant's possession of marijuana. The affidavit was therefore insufficient because the offense could have occurred years before; the magistrate was unable to determine any time limitations from the information before him.

The instant affidavit, however, dated October 11, 1982, indicated that the victim's body had been discovered on September 6, 1982. Additionally, Ryan alleged that he had seen Taylor in possession of the murder weapon within the past ten days. These factors amply served to provide for the magistrate a time frame in which to conclude that the jewelry and the handgun could well be contained in appellant's apartment.

Appellant lodges his final attack on the affidavit under the authority of Blue v. State, 441 So.2d 165 (Fla. 3d DCA 1983). Such an argument is without merit. Contrary to appellant's assertions, the affidavit under these circumstances required no explicit statement that the jewelry and gun could be located in appellant's apartment. Because the items could reasonably be presumed to be located either on the appellant's person or in his home, it was not arbitrary for the magistrate to make that determination. Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1973); State v. Malone, 288 So.2d 549 (Fla. 1st DCA 1974).

Appellant next argues that the testimony of Richard Miller, a fellow inmate during his incarceration after the murder, should have been suppressed under the authority of United States v. Henry, 447 U.S. 264 (1980). Having reviewed Henry and the Court's more recent pronouncement in Maine v. Moulton, 106 S.Ct. 477 (1985), we find no such impermissible interference with appellant's sixth amendment right to counsel in this case, and reject this claim.

In Henry, the Court found an informant's testimony inadmissible when the informant, the defendant's cellmate,

was approached by the police and instructed to "be alert" to any statement the defendant might make. The informant thereby became a government agent for the illicit purpose of obtaining incriminating statements from the accused in the absence of counsel. The Court, in applying Massiah v. United States, 377 U.S. 201 (1964), and finding that Henry's right to counsel had been violated, essentially affirmed that the government would not be permitted to obtain by trickery or stealth incriminating evidence it could not have legitimately obtained. In analyzing whether the government had impermissibly "deliberately elicited" the information from the defendant through its informant, 447 U.S. at 272, the Court focused upon certain elements of the government/informant relationship: the government's initial contacting of the witness, known to have a history as a paid informant, its subsequent instructions to "be alert" to the defendant's statements, and the "contingent fee" arrangement providing for the witnesses' compensation. These elements indicated an orchestrated plan reflective of the government's intention to set the stage for an interference with Henry's right to the assistance of counsel.

In the subsequent Moulton decision, the court found that the state had "knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent," 106 S.Ct. at 490, and so violated the defendant's sixth amendment rights. In spite of the opinion's fairly broad language equating the state's "knowing exploitation . . . of an opportunity to confront the accused without counsel being present" with its "intentional creation of such an opportunity," 106 S.Ct. at

487, the Court found such "knowing exploitation" on fairly outrageous facts.

First, the individual acting as a government agent, Colson, was no mere cellmate of Moulton's. Rather, he was a co-defendant, facing trial on the same charges as Moulton, and apparently aligned with Moulton against the state in the adversarial process. Upon reaching an agreement with the authorities, Colson used this position to uncover incriminating evidence which legitimately lay beyond the authorities' reach.

Secondly, although Colson originally approached the police, it was the latter who conceived and set into motion, albeit with Colson's consent, the flagrant violations of Moulton's rights which followed. The authorities first placed a recording device on Colson's telephone, with instructions to activate the device upon receiving either anonymous phone threats or calls from Moulton. By this means, three conversations were recorded between Colson and Moulton. In the third conversation, Moulton asked Colson to set aside an entire day so that the two of them could meet and plan their defense.

The authorities then obtained Colson's consent to be equipped with a body wire transmitter in order to monitor and record the meeting. Although the police acknowledged at trial their awareness that the two were meeting to discuss the charges on which they both had been indicted, Colson was instructed "not to attempt to question [Moulton], just be himself in the conversation." 106 S.Ct. at 481. At the meeting, the two discussed and planned their alibis, and so necessarily detailed the commission of various crimes. Through joking and pretensions of forgetful-

ness, Colson induced Moulton to repeatedly incriminate himself. Upon the admission into evidence of several portions of this tape, Moulton was convicted.

We cannot find that either Henry or Moulton compel a finding that appellant's sixth amendment rights have been violated in this case. A review of the facts discloses no "stratagem deliberately designed to elicit an incriminating statement." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982), cert. denied, 459 U.S. 1158 (1983), quoting Malone v. State, 390 So.2d 338, 339 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981). First, Miller approached the authorities on his own initiative, indicating scheming on his part rather than the government's. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 105 S.Ct. 223 (1984); Barfield v. State, 402 So.2d 377 (Fla. 1981).

We affirm the vitality of this factor in a sixth amendment right to counsel analysis, noting that the Moulton Court's statement that "the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in Massiah or Henry," 106 S.Ct. at 486-87, refers to the initiation of contact between the accused and the agent, rather than the agent and the government. In Henry, in fact, a crucial element of the state's intentional creation of a situation likely to induce Henry to make incriminating statements involved its initial contacting of the agent and its subsequent instructions to "be alert" to Henry's statements.

Finally, we cannot find the "knowing exploitation" forbidden by Moulton in the absence of more action on the state's behalf tending to indicate a deliberate elicitation of incriminating information. After approaching au-

thorities with information of appellant's planned escape attempt, Miller was neither encouraged nor discouraged from obtaining further information. As we held in Johnson v. State, 438 So.2d 774, 776 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), "Henry and Malone do not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population." We find no violation of appellant's right to counsel.

In his third argument on appeal, appellant contends that the trial court erred in denying several motions for mistrial. Principally, appellant contends that the prosecutor's mention in his opening argument of Miller's anticipated testimony concerning appellant's escape attempt introduced to the jury irrelevant collateral crime evidence. In light of our holding above as to the admissibility of Miller's testimony, we disagree. The testimony was relevant and admissible as defining the relationship between the state's witness and appellant. Yesbick v. State, 408 So.2d 1083 (Fla. 4th DCA), review denied, 417 So.2d 331 (Fla. 1982). Appellant's several other motions for mistrial similarly lack merit.

Appellant next contends that the trial court abused its discretion in limiting the cross-examination of state witness Robert Taylor. Taylor, appellant's co-defendant in a Mississippi murder prosecution, awaited trial on murder charges in Georgia at the time he testified in appellant's trial. Prior to trial, the state filed several motions in limine seeking to limit the scope of cross-examination of Taylor. The trial court granted two of these motions, prohibiting the defense from asking Taylor any ques-

tions in response to which he could be expected to exercise his right against self-incrimination, and from mentioning Taylor's confession to an Orange County sheriff of a number of crimes.

We cannot find that the trial court abused its discretion in either respect. In granting the first motion, the court did not prohibit the defense from impeaching the witness regarding the murder charge. Rather, it prohibited the defense from delving into the facts of a pending case. The jury learned of the charges, and that Taylor hoped to have the state attorney intervene on his behalf at the trial. Because the essence of the witnesses' bias was established through direct and cross-examination, we can find no error in the trial court's "preventing the cross-examination from . . . becoming, under the guise of impeachment, a general attack on the character of the witness." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Similarly, we find the exclusion of the Orange County "confessions" proper. The state's uncontradicted motion established that Taylor "confessed" to a series of unsolved crimes on which the state had insufficient evidence to prosecute, thus clearing the police files in return for a promise not to forward the cases to the state attorney for prosecution. Since the jury was adequately exposed to Taylor's extensive felony record and his tendency to bargain with the state, no need existed for further cross-examination, especially upon such a flimsy foundation.

Appellant next argues that the trial court erred in allowing witness Detective Hansen to read into evidence portions of a statement made by Taylor in 1982, under

section 90.801(2)(b), Florida Statutes (1983), as prior consistent testimony tending to rebut implications of improper motive or recent fabrication. While noting that a witness' testimony may not ordinarily be bolstered with corrobation with his own prior consistent statements, Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982), we find that the statements in this case fall within the rule's narrowly drafted terms and were properly admitted. First, through its references in cross-examination to Taylor's negotiations with the state attorney's office involving armed robbery charges, the defense adequately impeached the witnesses' credibility, raising the specters of both improper motive and recent fabrication. Because, too, the statement in question was made at the time of Taylor's arrest in October 1982, prior to the robbery plea negotiations, Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983), and the actual filing of the Georgia murder charge, the trial court could properly have found that the statement was made prior to the existence of Taylor's motive to fabricate.

In his sixth point on appeal appellant argues that a mistrial was required after certain comments in the prosecutor's closing argument impermissibly directed the jurors' attention to appellant's failure to take the stand. Fla. R. Crim. P. 3.250. An examination of the statements in question and the context from which they arose, however, leads us to conclude that the statements directed the jury's attention to defense counsel and the evidence presented rather than to appellant's failure to testify. First, in the context of reviewing the bargain that witness Miller

had struck with the state in exchange for his testimony, the prosecutor said:

Nobody has come here and said Mr. Miller's testimony was wrong, or incorrect, or that that was not the deal he was offered.

Far from commenting on appellant's failure to testify, we find that an examination of the statement in context make clear that "Mr. Miller's testimony" refers only to his testimony on his negotiations with law enforcement authorities. As such, the statement merely permissibly commented on the evidence. United States v. Fogg, 652 F.2d 551 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); State v. Bolton, 383 So.2d 924 (Fla. 2d DCA 1980).

Second, we find that the prosecutor's statement to the jury that "[Y]ou haven't number one, heard any evidence that Donald Dufour had any legal papers in the cell with him" merely rebutted the statement of the defense in its closing argument hinting that witness Miller had access to and could have based his testimony upon appellant's "legal papers." This comment merely referred to the lack of any evidence on the question, White v. State, 377 So.2d 1149 (Fla. 1979), and fell into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject. State v. Mathis, 278 So.2d 280 (Fla. 1973). The trial court thus acted properly in denying these motions for mistrial.

Appellant next argues that the trial court committed reversible error in finding appellant's absence at a pretrial motions hearing voluntary and conducting it in his absence. Although appellant would liken the facts of the instant case to the absence found reversible in Francis

v. State, 413 So.2d 1175 (Fla. 1982), we agree with the state that appellant voluntarily absented himself from the proceeding within the terms of Florida Rule of Criminal Procedure 3.180(b) by embarking on a "hunger strike" culminating in his hospitalization during the hearing. The trial court acted well within its discretion in so ruling.

Next, appellant challenges the trial court's denial of his motions for a continuance. Finding that the requisite showing of a palpable abuse of the court's discretion in so ruling has not been made, Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981), we reject this claim.

In his ninth point on appeal, appellant contends that the trial court erred in declining to impose sanctions for an alleged violation by the prosecution of the provisions of Florida Rule of Criminal Procedure 3.220(b)(3). We must first examine the rule's terms to ascertain whether or not any violation occurred below, and, if so, whether any prejudice accrued therefrom to the appellant. James v. State, 453 So.2d 786, 790 (Fla. 1984), cert. denied, 105 S.Ct. 608 (1984).

Rule 3.220 sets forth the respective rights and obligations of the parties concerning discovery in the criminal context. Section (b)(3) of the rule indicates that if the defense has chosen to demand of the state a list of the latter's witnesses, it must, within seven days of the receipt of that list, furnish to the state a list of its expected witnesses. At that point, the rule limits the prosecution's otherwise plenary power to subpoena witnesses and take

ex parte testimony as to any violation of the criminal law within its jurisdiction. Able Builders Sanitation Co. v. State, 368 So.2d 1340 (Fla. 3d DCA), dismissed, 373 So.2d 461 (1979); § 27.04, Fla. Stat. (1985). After receiving the defense witness list, the prosecutor may not subpoena any individual on that list without notifying defense counsel and allowing them to attend the interview and examine the witness.

The alleged violation below involved witness Stacey Sigler. Sigler was originally listed on the state's witness list provided to the defense under rule 3.220(a)(1)(i). The defense merely duplicated this list and submitted it as its own, thereby attempting to force the requirement of notice and the right to attend any meeting between Sigler and the prosecution. Relying on dictum in State v. Barreiro, 432 So.2d 138, 140 n.5 (Fla. 3d DCA 1983), review denied, 441 So.2d 631 (1983), which indicated that "[i]f defense counsel wants to protect against the state's ex parte examination of a witness, he can do so by furnishing the witness's name on his list of defense witnesses," the defense attempted to gain, and was denied, admission to an interview between Sigler and the state's attorney. The defense subsequently moved for dismissal of the indictment or the exclusion of Sigler's testimony as sanctions for the state's behavior in excluding the defense from the interview.

Because we find that no violation of the discovery rules took place below, we approve the trial court's refusal to impose any sanctions. Appellant's construction of the discovery provisions is overbroad and would cut the rule loose from its logical moorings. It is not enough to merely duplicate the list of state's witnesses and thus

transform Sigler into a witness "whom the defense counsel expects to call as [a witness] at the trial or hearing." Fla. R. Crim. P. 3.220(b)(3).

No indication exists that defense counsel, in good faith, intended to call Sigler as a witness. In fact, because Sigler proclaimed ignorance of the crime until the meeting complained of, she apparently lacked the requisite personal knowledge required of a witness. Application of the rule's provisions to the instant facts, as urged by appellant, would frustrate the purpose underlying the rule. When properly applied, rule 3.220(b)(3) serves the protective purpose of preventing the state from driving an unfair wedge between defense counsel and its key witnesses, through ex parte examination, during sensitive pretrial stages. It is not intended to inhibit the prosecution's power to prepare its case by disallowing all ex parte communication with its witnesses.

We disapprove of tactics such as those employed by the defense below, because the inclusion of an unwarranted abundance of names on the defense witness list can ultimately only dilute the rule's protective power. The defense is certainly not prohibited from listing as its own those witnesses already listed by the state, but it must do so conscientiously, naming only those it actually expects to call. Otherwise, by attempting to use the rule as a sword, rather than the shield it is intended to be, the defense risks losing any protection which that shield might have offered.

The court additionally rejected the application of rule 3.220(b)(3) because it found, under the circumstances, that Sigler approached the prosecutor voluntarily. In

spite of the initial subpoena, the court found that Sigler had approached the authorities, on the advice of her attorney, in order to negotiate for immunity. Noting that the interview took place two days after the subpoena date, the court found her approach voluntary and the rule inapplicable.

Because we cannot disagree that Sigler was improperly listed as a defense witness, and that her testimony was given voluntarily, we approve of the trial court's refusal to impose sanctions. Bobley v. State, 327 So.2d 900 (Fla. 3d DCA 1976), cert. denied, 341 So.2d 292 (Fla. 1976).

Appellant next argues that the trial court's forcing him to wear leg shackles during the trial led to undue jury prejudice and violated his fundamental right to a fair trial by vitiating his right to a presumption of innocence. Appellant cites Estelle v. Williams, 425 U.S. 501 (1976), for the principle that forcing a defendant to face trial in prison garb impermissibly risks on impairment of his presumption of innocence. In Estelle, however, the Court cited Illinois v. Allen, 397 U.S. 337 (1970), in which the Court upheld the practice of shackling the defendant when necessary to control a contumacious defendant, and noted that in some circumstances physical restraints may further an essential state policy. 425 U.S. at 505.

The court below found the shackles necessary in view of appellant's planned escape attempt from the Orange County jail and his conviction of two murders in Mississippi and subsequent placement on death row. The court explained that while "if he tried to escape he would be unsuccessful . . . someone may be hurt. I don't want that to occur."

The court did attempt to minimize any prejudice accruing to appellant by granting defense counsel's request to place a table in front of the defense table in order to hide the leg shackles. Under these circumstances, and from the lofty stance of appellate review, we will not second-guess the considered decision of the trial judge. We therefore reject appellant's claim.

In his eleventh point on appeal, appellant contends that the trial court erred in denying appellant's motion for mistrial after the jury learned that one juror had received a "strange" phone call and been dismissed. The caller dialed the number, asked if "Mr. Girdner", the juror's husband—not the juror—was in, and hung up. Although the phone call could not be linked to the trial in any sense, the trial court, pursuant to defense counsel's urgings, in an "abundance of caution" dismissed the juror from service immediately prior to closing arguments.

Contrary to the court's instruction, the dismissed juror mentioned the phone call to other members of the jury. The court then called the jury in, explained the circumstances surrounding the call and the juror's dismissal, and assured the jury that the call had no connection with the trial and that their phone numbers were not made public. Finally, the court determined that the jurors had no reservations about their further service.

Determinations of whether substantial justice requires a mistrial and related questions involving juror conduct are both lodged within the sound discretion of the trial court. Doyle v. State, 460 So.2d 353 (Fla. 1984). In light of the tenuous connection between the trial and the call, the court's instruction to the jury was sufficient to cure

any taint which may have resulted from the juror's knowledge of the call. Clark v. State, 443 So.2d 973 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984); State v. Tresvant, 359 So.2d 524 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 375 (1979). We therefore reject appellant's contention.

We now reach appellant's claims as to error in the sentencing portion of the proceeding. First, appellant argues that the trial court erred in denying his proposed special instructions on the jury's sentencing recommendation. We cannot find the court's refusal to deviate from the standard jury instructions improper, and the court had no duty to instruct the jury that a life sentence could be imposed even in the absence of any mitigating circumstances. In fact, we recently rejected such a contention in Kennedy v. State, 455 So.2d 351 (Fla. 1984), cert. denied, 105 S.Ct. 981 (1985).

Next, appellant argues that the trial court erred in admitting into evidence during the penalty phase extensive details of an earlier murder he had committed in Mississippi. While appellant acknowledges that details of prior felonies involving the use or threat of violence to the person are properly admitted in the penalty phase of a capital trial, and that evidence inadmissible in the guilt phase may be relevant and admissible in evaluating aggravating and mitigating circumstances, Perri v. State, 441 So.2d 606 (Fla. 1983); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), he contends that the trial court here "went too far." We find this argument meritless. Justus v. State, 438 So.2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984); Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984).

In his fourteenth point on appeal, appellant argues that the trial court erred in denying his motion to strike death as a possible penalty because the charging indictment had failed to allege the aggravating factors possibly subjecting him to the death penalty. We reject this argument once again. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982); Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Appellant next argues that the trial court erred in finding that two of the aggravating factors found were proven beyond a reasonable doubt. First, we agree that the court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest, section 921.141(5)(e), Florida Statutes (1981), since the evidence failed to establish the requisite proof of an intent to avoid arrest or detection through the killing. No showing was made that the dominant or sole motive for the murder was the elimination of witnesses. Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981 (1982).

We affirm the trial court's finding, however, that appellant's announcement of his intention to commit a murder and the subsequent execution-style shooting sufficiently established a cold, calculated and premeditated murder with no pretense of any moral or legal justification. § 921.141(5)(i), Fla. Stat. (1981). Because the court below found three proper aggravating and no mitigating circumstances, the result it reached, in spite of the error as to one factor, was correct and the death penalty properly imposed. Harmon v. State, 438 So.2d 369 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Finally, appellant raises a number of claims attacking the constitutionality of Florida's capital sentencing statute which he acknowledges this Court has rejected in the past. Ferguson v. State, 417 So.2d 639 (Fla. 1982): Lewis v. State, 398 So.2d 432 (Fla. 1981). We do so again.

Upon our independent review of the evidence as required by Florida Rule of Appellate Procedure 9.140(f), we have found no insufficiency thereof. Finding no reversible error in either the guilt or penalty phases of appellant's trial, we affirm both the conviction and sentence imposed.

It is so ordered.

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., Concur OVERTON, J., Concurs in result only in the conviction, and concurs with the sentence.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY TAYLOR,

Defendant-Appellant.

No. 85-1758

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Slip Opinion

September 8, 1986, Filed

APPEAL-STATEMENT:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, No. CR-85-14-E.

COUNSEL:

John E. Green (William S. Price, United States Attorney, and Stephen J. Koratash, Assistant United States Attorney, with him on the brief), First Assistant United States Attorney, for Plaintiff-Appellee.

Scott W. Reed, for Defendant-Appellant.

OPINION BY: BARRETT

OPINION:

Before BARRETT, McKAY and MOORE, Circuit Judges.

Defendant Appellant, Anthony Taylor, appeals from a jury conviction on two counts of violating 18 U.S.C. § 2113(a) and (d), bank robbery and assault on a person while committing a bank robbery. The jury convicted Taylor of an armed robbery of the Crown Heights Branch of the Local Federal Savings and Loan Association of Oklahoma City, Oklahoma, on January 4, 1985, and an armed robbery of the Communications Federal Credit Union in Oklahoma City, Oklahoma, on December 13, 1984. The district court entered an Order of Judgment and Commitment on May 16, 1985. A Notice of Appeal was filed by Taylor on May 20, 1985. Jurisdiction is vested in this court pursuant to 28 U.S.C. 1291.

Defendant Taylor raises four issues on appeal: (1) whether the district court erred in allowing the testimony of Wayne Nave into evidence in violation of Taylor's

Sixth Amendment right to counsel; (2) whether the district court erred in denying Taylor's Motion to Sever the trial on the counts in the indictment; (3) whether the conduct of the Government's attorney amounted to prosecutorial misconduct requiring a new trial; and (4) whether the conduct of Taylor's trial counsel constituted ineffective assistance of counsel?

I.

A.

Taylor contends that the admission and use of incriminating statements he made to a Government informant about the armed robberies for which he was on trial, violated his Sixth Amendment right to counsel. The Government contends that the informant was not a Government agent and therefore the protections afforded under the Sixth Amendment do not apply. We agree with the Government that under the facts and circumstances of this case, the informant was not a Government agent. We hold that Taylor's Sixth Amendment right to counsel was not violated and the informant's testimony at trial regarding Taylor's incriminating statements was properly admitted.

The relevant facts regarding Taylor's Sixth Amendment claim are not in dispute. Taylor was indicted by a grand jury on February 5, 1985, on two counts of armed robbery. Following his indictment, and while he was awaiting trial in the Oklahoma County Jail, Taylor encountered Wayne Nave with whom he previously had been employed. Nave testified that Taylor initiated a conversation in which he said "that he had some bank robbery charges and that he needed an alibi because he felt

as though he could beat the cases, and that he really wasn't worrying about one of the robberies but he needed a good alibi for January 4th because of the robbery at the local Federal Savings and Loan on Western." (R., Supp. Vol. I, p. 144.)

After this encounter, and at Nave's request, an agent of the Federal Bureau of Investigation (FBI) visited Nave at which time Nave related the substance of Taylor's statements. Taylor was subsequently placed in the same cell with Nave. While they were cellmates, Taylor admitted to Nave that he robbed both financial institutions and related the details of those robberies.

Nave testified on direct and cross-examination that he hoped to get preferential treatment as a result of his cooperating with the Government in this case. According to Nave, however, no promise or guarantee of benefits was made by the Government:

A. [T]here was no plea bargain or anything involved in me giving the information. But I really wanted to know what type of institution I was going to myself and whether or not I would be here of close [sic] to my family.

Like I said, there was no deal made with the government for me to give this information.

Q. Where is your family located?

A. In Los Angeles, California.

Q. Were you hoping that, or did you ask this information, the fact that you're cooperating with the government be passed along to the presentence investigators in your case?

A. Yes.

Q. Were you hoping that this information might be taken into account by the sentencing Judge?

A. Yes, I was, due to the fact that me testifying at this trial.

Q. So, in other words, you're hoping it would help you out.

A. Yes.

Q. You've got three prior bank robberies; is that correct?

A. Yes.

Q. And does the F.B.I. indicate to you, or any other federal official indicate to you whether or not they would pass the information of your cooperation along to the appropriate people?

A. They said that the information would be made note of and it would be passed on. But as far as the guarantee of anything being done as a result of it, there wasn't one.

Q. Because—is it your testimony here today that no promises have been made to you of any type or form?

A. No.

Q. They have not.

A. No.

(Id. at 145-46.)

Taylor's Sixth Amendment claim is based on United States v. Henry, 447 U.S. 264 (1980) and Massiah v. United

States, 377 U.S. 201 (1964). There is no dispute that Taylor's Sixth Amendment right to counsel had attached because Taylor's statements were made to Nave after Taylor was indicted. Kirby v. Illinois, 406 U.S. 682, 688 (1972). There is also no dispute that Taylor properly sets forth the Sixth Amendment issue on appeal under Henry and Massiah: "In the instant case the court is confronted with the question of whether or not Wayne Nave was a government agent who deliberately illicited incriminating statements from Anthony Taylor." (Brief of Appellant, pp. 4-5.) Therefore, in order to find a violation of a defendant's Sixth Amendment right to counsel, a court must find that defendant's statements (1) were made to a Government agent, and (2) were deliberately elicited.

We hold that Nave was not a Government agent. We also hold that the protections of the Sixth Amendment right to counsel enunciated in Massiah and Henry are inapplicable when, after the right to counsel has attached, statements by a defendant are made to an individual who is not an agent for the Government, although he may be a Government informant. This is so regardless of whether the statements were "deliberately elicited." See, e.g., Thomas v. Cox, 708 F.2d 132, 136 (7th Cir.), cert. denied, 464 U.S. 918 (1983); United States v. Metcalfe, 698 F.2d 877, 882-83 (3rd Cir.), cert. denied, 461 U.S. 910 (1983); United States v. Calder, 641 F.2d 76, 78-79 (2d Cir.), cert. denied, 451 U.S. 912 (1981).

We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel. See e.g., Thomas v. Cox, supra at 136. This determination

must be made under the facts and circumstances of each case, considering factors articulated by certain courts which have reviewed the issue of whether an individual is a Government agent. The Supreme Court in Henry implicitly held that a Government informant was an agent because he was paid and acted pursuant to Government instructions. 447 U.S. at 270. In United States v. Calder, supra at 78-79, however, the court held that no agency was created because the Government and defendant's cellmate who acted as a Government informant did not enter into any agreement. Although the cellmate's attorney had discussed with the United States Attorney the possibility that his client might cooperate, no cooperation agreement was entered into until after the incriminating statements were made by defendant. Id. Absent any express or implied agreement with the Government, the court held that Calder's cellmate was not a Government agent and Sixth Amendment protections were therefore not invoked. See also, United States v. Surridge, 687 F.2d 250, 254-55 (8th Cir.), cert. denied, 459 U.S. 1044 (1982).

In United States v. Franklin, 704 F.2d 1183, 1189-90 (10th Cir.), cert. denied, 464 U.S. 845 (1983), we held that under Henry and Massiah, Franklin's right to counsel was not violated when his statement to a Government informant was neither deliberately elicited nor made to a Government agent. After he was arrested, Franklin contacted his former wife and admitted murdering two joggers. Unknown to Franklin, his former wife had consented to having her telephone tapped by the FBI. Because Franklin's former wife was neither paid nor instructed by the Government, factors which the Supreme Court found significant in Henry, supra at 270, she was

not held to have acted as a Government agent. United States v. Franklin, supra.

In United States v. Geittmann, 733 F.2d 1419 (10th Cir. 1984), we considered several factors to conclude that an informant was a Government agent. In Geittmann, the informant was a co-defendant who entered into a cooperation agreement with the Government to make tape recordings of conversations between himself and Geittmann. The informer began taping the conversations at the request of the Government. Government officials led the informant to believe that his cooperation would be to his advantage. Although the informer was not paid for his services, we held that under these circumstances he was a Government agent, id. at 1427, and distinguished the case from one in which independent parties come to the police with unsolicited incriminating information provided by defendants. Id., citing United States v. Franklin, supra.

Under the facts of this case, we hold that Nave was not a Government agent. No agreement was made between Nave and the Government and no benefits accrued to Nave for his cooperation. Any benefits which Nave hoped to obtain were mere expectancies. We decline to infer an agreement between the Government and Nave merely from the placement of Taylor in Nave's cell. In the absence of any express or implied quid pro quo underlying the relationship between Nave and the Government, Thomas v. Cox, supra at 137, and in the absence of any instructions or directions by the Government, we hold that Nave was not a Government agent. Taylor's right to counsel was not violated even if Nave had deliberately elicited incriminating statements from Taylor. Therefore, Nave's testimony regarding Taylor's incrim-

inating statements about the armed robbery was properly admitted in evidence.

I.

B.

Even if Nave were a Government agent who deliberately elicited the incriminating statements from Taylor, Nave's testimony relative to Taylor's admissions of culpability in the charged crimes would have been admissible due to the failure of defense counsel to properly object.

At trial, Taylor's counsel objected to Nave's testimony as follows:

Q. Did you have an occasion to talk with Mr. Taylor about two armed robberies, one at the federal credit union or at Communications Federal Credit Union and another one at a savings and loan on Western?

MR. SHORES: To which we will object, your Honor, being no proper predicate laid. This gentleman apparently gone [sic] to work for the government at that point.

THE COURT: Well, that goes to the weight of the evidence rather than the admissibility of it. Overruled. Go ahead.

Q. (By Mr. Korotash) My question is, did you have a conversation about a couple of bank robberies with Mr. Taylor?

A. Yes, I did.

Q. And where did those conversations take place?

A. In my cell in the Oklahoma County Jail.

Q. Do you recall when that was?

A. It was approximately three weeks ago.

Q. And did Mr. Taylor tell you anything about any bank robberies?

A. He described to me what had taken place in the robberies and more or less how everything developed to this point.

Q. All right. What I want you to do is tell the jury the substance of that conversation. I want you to tell the jury what Mr. Taylor said, to the best of your recollection, in a verbatim way, and what you said. O.K.?

MR. SHORES: Repeat—again, your Honor, we will object to the verbatim of any conversation held by this man while he was under the supervision of the government.

THE COURT: Overruled. Go ahead.

(R., Supp. Vol. I, pp. 146-48.) The above quoted excerpt of the record constitutes the substance of defense counsel's objection at trial to Nave's proffered testimony.

The general rule is that for a party to preserve alleged error for appeal, he must make a timely and proper objection. Under the Federal Rules of Evidence, an objection to a ruling admitting evidence is proper when "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . . ." Fed. R. Evid. 103(a)(1). The specific ground for reversal of an evidentiary ruling on appeal must also be the same as that raised at trial. Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984). Absent a timely and

proper objection, the alleged error will be waived on appeal except when it constitutes plain error resulting in manifest injustice. United States v. Grismore, 546 F.2d 844, 850 (10th Cir. 1976).

In United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983), we held that evidentiary objections can be waived, even if they have a constitutional footing, particularly where the basic factual and legal predicate for them was available. In Dysart, we refused to consider specific allegations of error raised for the first time on appeal even though the defendant made a general objection at trial. Id. at 1255.

We believe that under the circumstances of this case, the defense counsel's objections at trial were improper because they were general and unclear. The district court's ruling even if erroneous did not constitute plain error. Therefore, even if Nave were a Government agent who deliberately elicited the statements from Taylor, we would hold the statements admissible in this case due to counsel's failure to properly object to Nave's testimony.

II.

Taylor contends that the district court erred in denying his Motion to Sever the trial on the two counts of armed robbery. Taylor contends that he was prejudiced by joinder of the two counts because the jury confused and accumulated the evidence and inferred guilt from the count about which the Government had a stronger case.

Rule 8(a) of the Federal Rules of Criminal Procedure provides that "[t]wo or more offenses may be charged in the same indictment or information in a separate count

for each offense if the offenses charged are of the same or similar character. . . ." Taylor concedes that it is within the sound discretion of the district court to order separate trials of counts under Rule 14, of the Federal Rules of Criminal Procedure.

We do not believe the district court abused its discretion in denying Taylor's Motion to Sever. We find nothing in the record to support Taylor's contention that the jury was incapable of properly separating the evidence of each robbery as instructed. In addition, we find nothing in the record to support Taylor's contention that the jury accumulated the evidence or inferred guilt from the stronger count.

III.

Taylor contends that the United States Attorney committed prosecutorial misconduct by his repeated references to the person in the bank as the "defendant" prior to any evidence of identification. Taylor contends that these comments tainted the identification process and infused upon the jury the prosecutor's opinion of Taylor's guilt so as to effectively deny Taylor the presumption of innocence.

Taylor concedes that the prosecutor's use of the term "defendant" in questioning a witness prior to identification was inadvertent. Likewise, the Government acknowledges that the use of the term "defendant" in questioning was an inadvertent and unfortunate mannerism in the prosecutor's presentation. We have held, however, that prosecutorial misconduct is not per se reversible error. We follow the general rule that not all misconduct

requires reversal, but rather, it is only when such conduct can be said to have influenced the verdict that it becomes prejudicial. United States v. Devine, 403 F.2d 93, 96 (10th Cir.), cert. denied, 394 U.S. 1003 (1968).

Assuming, without deciding, that the prosecutor's use of "defendant" during questioning constitutes prosecutorial misconduct, we hold that the prosecutor's statements did not influence the jury's verdict. The in court identification of Taylor was unequivocal. In addition, the evidence linking him to the two crimes was strong. The evidence clearly supports the verdict and any prejudice from the prosecutor's conduct had little, if any, effect on that verdict.

IV.

Taylor contends that he was given ineffective assistance of counsel at trial. Taylor contends that the specific errors made by trial counsel included the following: (1) failure to file pretrial motions in limine to limit the nature and extent of the testimony of Wayne Nave; (2) failure to file motions and make proper objections to pretrial identification procedures; and (3) failure to make strategic decisions during the course of trial.

The test for determining whether assistance of counsel is ineffective is clearly set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984). In Strickland, the Supreme Court held that to establish a case of ineffective assistance of counsel, defendant must show that the alleged errors of counsel were so serious as to deprive defendant of a fair trial whose results were reliable. Id. at 2064.

We agree with the Government that the alleged errors of counsel did not deprive Taylor of a fair trial. We hold

that had counsel performed the way in which Taylor contends was crucial to a fair trial, there would not have been any difference in the evidence offered or the conclusions drawn by the jury.

AFFIRMED.

DISSENT BY: McKAY

DISSENT:

McKAY, Circuit Judge, dissenting:

I agree with parts II, III and IV of the court's opinion. However, I cannot be consistent with the Supreme Court authority and, at the same time, agree with the majority's handling of the Sixth Amendment issue. Therefore, I must respectfully dissent from part I of the opinion and the result obtained in this case.

After the defendant's Sixth Amendment right to counsel had attached, Mr. Nave, who was incarcerated in a detention facility along with the defendant, saw an opportunity to get some help in obtaining a favorable place for his long-term imprisonment. On his own initiative, according to his account, Mr. Nave summoned to his cell federal officials who were preparing the case against the defendant. There he reported a conversation in which the defendant indicated that he was looking for an alibi. Mr. Nave proposed that he would obtain information from the defendant which would be useful to the prosecution in defendant's upcoming trial, if they would inform the probation service, the presentence service and the judge that he was assisting the government on Mr. Taylor's case and speak to the judge about his place of incarceration. In direct exchange for that offer, the government agents agreed to tell the authorities that he had cooperated, but

they would not guarantee that Mr. Nave would be put in a preferred place of incarceration. The government agents, after having reached this understanding with Mr. Nave, placed the defendant in Mr. Nave's cell to facilitate the scheme.

The record is incomplete regarding Mr. Nave's efforts to gather information from the defendant, but we do know that Mr. Nave and the defendant thereupon had "a conversation about a couple of bank robberies . . . ." Record, supp. vol. 1, at 147 (emphasis added). In answer to the question, "And where did those," Mr. Nave replied, "In my cell in the Oklahoma City Jail." Id. (emphasis added). When the prosecutor asked, "What I want you to do is to tell the jury the substance of that conversation," id. (emphasis added), Mr. Nave recited at length the incriminating information on which much of this prosecution rests. Though Mr. Nave said, "I didn't pump him for anything," he added, "The conversation, I never initiated the conversation. The Conversation has brought to me." Id. at 162 (emphasis added). Nowhere in the record is there any indication that the government, which knew that defendant's Sixth Amendment right to counsel had attached, instructed Mr. Nave not to elicit or encourage information in circumvention of that right.

To this whole line of questioning, counsel for defendant objected, saying: "To which we will object, your Honor, as being no proper predicate laid. This gentleman apparently has gone to work for the government at that point." Record, supp. vol. 1, at 147. He further objected, "Repeat—again, your Honor, we will object to the verbatim of any conversation held by this man while

he was under the supervision of the government." While the majority makes much of counsel's alleged failure to raise specifically the issue, in light of the facts in this case, the objection could have been on no ground other than the Sixth Amendment violation. It is not necessary for counsel to give an essay on the basis of the objection. In my view, it was sufficient for him to indicate that he was objecting because Mr. Nave was an agent of the government. See United States v. Cummisky, 728 F.2d 200, 205 (3d Cir. 1984), cert. denied, 105 S.Ct. 1869 (1985).

Because the objection was adequate, two matters remain to be considered. The first concerns the question of the relationship between Mr. Nave and the government when he undertook to have "conversations" with the defendant. In its opinion, the majority focuses its analysis on its determination that the government promised Mr. Nave no consideration for his efforts. The notion of consideration, however, is misplaced in this Sixth Amendment context when discussing agency. It is perfectly clear from reading the facts of such cases as Kuhlmann v. Wilson, 54 O.S.L.W. 4809 (U.S. June 26, 1986); Maine v. Moulton, 106 S.Ct. 477 (1985); United States v. Henry, 447 U.S. 264 (1980); and Massiah v. United States, 377 U.S. 201 (1964), that all that is required for agency in this context is that the informer, for whatever motivation, seek the information from the defendant pursuant to an understanding reached between the informer and the investigating officers. Nothing in the Supreme Court's opinions establishes that whether an informant is an agent turns on whether the police offer the informant consideration. Indeed, according to Moulton, even "knowing exploitation by the State of an opportunity to confront the accused

without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." 106 S.Ct. at 487. The Supreme Court's disregard for archaic notions of consideration is consistent with much of contract law, in which the requirement of consideration has been eliminated. See, e.g., Restatement (Second) of Contracts § 90 (1981); U.C.C. § 2-205 (1977).

In any event, even in a routine contracts case the request for special consideration from the judge about a place of incarceration and a promise to give the good word is more than sufficient consideration either under an academic or a practical view of that notion. Here the government provided such consideration when it agreed to perform a service for the informer and deliberately placed the defendant in his cell in order to carry out this nefarious circumvention of known Sixth Amendment rights. Thus, I conclude that Mr. Nave acted as an agent of the government when he extracted incriminating information from the defendant.

The second matter is determining whether the informer acted only passively or actively in carrying out this scheme to obtain information from the defendant. The only conceivable ground preventing reversal simply on the basis of Moulton is any implications which might be drawn from Kuhlmann v. Wilson, where the Court stated that

a defendant does not make out a violation of [his Sixth Amendment] right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the

defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. 54 U.S.L.W. at 4815. Kuhlmann makes clear that once the police have set about to deliberately bypass Sixth Amendment rights they may be excused if they carefully instruct their informer to avoid precipitating the incriminating statements and if their informer follows those instructions. In my view, once the government has entered into an agreement that may circumvent a defendant's right to counsel, it has the burden to show by a preponderance of evidence that it instructed the informer to be passive and that he followed those instructions. However, Kuhlmann does not save the government's deliberate circumvention of the defendant's Sixth Amendment rights for two reasons.

First, although the facts in Kuhlmann are somewhat similar to those in this case, it is clear that the Supreme Court relied on 28 U.S.C. § 2254(d) (1982) to reach its factual determination that the informer did not elicit any information from the defendant. That section provides that state court findings of fact are binding on federal courts in habeas corpus actions. In Kuhlmann there was an express state court finding that the informant was instructed only to listen to the defendant, that he followed that instruction, and that the defendant's statements to the informer were spontaneous and unsolicited. However, the facts of our case stand in stark contrast to those judicially established in Kuhlmann. Absolutely no instructions were given to restrain Mr. Nave from soliciting, encouraging or otherwise inducing statements by the defendant. Indeed, all this record reveals is that Mr. Nave

and the defendant had "a conversation" pursuant to the prior understanding with the police that the informer would use the joint celling as an opportunity to gather information. Neither finding nor fact suggests that the informer was instructed to avoid eliciting or encouraging statements.

Second, it is clear that Kuhlmann recognizes that Moulton and its predecessors are binding law. 54 U.S.L.W. at 4815. In Moulton the police did not arrange the meeting between the defendant and the informer. Indeed, the meeting had been arranged before the police approached the informer. The police became aware of the already-planned meeting while reaching an agreement with the informer to have him record conversations with the defendant. Furthermore, in Moulton the government officials instructed the informant "to be himself," "act normal," and "not interrogate" the defendant. 106 S.Ct. at 488 n.14.

Nevertheless, the Court held that the informer's conversation violated the defendant's Sixth Amendment rights. As the Kuhlmann Court described the illegal conduct in Moulton, "[B]ecause of the relationship between the defendant and the informant, the informant's engaging the defendant 'in active conversation about their upcoming trial was certain to elicit' incriminating statements from the defendant . . . . Thus, the informant's participation in this conversation was 'the functional equivalent of interrogation.'" 54 U.S.L.W. at 4815 (citations omitted). The Court further explains in Moulton that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confronta-

tion between the accused and the state agent." 106 S.Ct. at 487.

In my view, the Moulton test has been met. When Mr. Nave engaged the defendant in active conversation designed to obtain incriminating evidence, the defendant's right to counsel was violated. This violation of Sixth Amendment rights is not trivial. The testimony of this informer was central to an otherwise flimsy case. Without that testimony the defendant very likely would have been acquitted.

In conclusion, the agency analysis as employed by the majority will not bear scrutiny. The Moulton line of cases makes abundantly clear that the facts of this case establish a violation of Sixth Amendment rights. An attempt to avoid this violation on the ground that the objection was inadequate simply ignores the fact that the objection could have been based on nothing other than Sixth Amendment grounds and was repeatedly and timely made. Thus, I would reverse the decision of the trial court.